IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2704 of 1983

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SEARLE (INDIA)LTD.

Versus

UNION OF INDIA

Appearance:

MR TRIVEDI for MR KS NANAVATI for Petitioner
MR MR SHAH for Respondents No. 1-3

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE D.A.MEHTA

Date of decision: 07/02/2002

ORAL JUDGEMENT

(Per : CHIEF JUSTICE MR DM DHARMADHIKARI)

#. The petitioner is a Company engaged in the business of manufacture of medicines. Under Exemption Notification No.48/77 dated 1.4.1977, issued in exercise of powers conferred under sub-rule 1 of Rule 4 of the Central Excise Rules, 1944, framed under the Central Excise & Salt Act, 1944 (hereinafter referred to as "the Rules" and "the Act" respectively), clinical samples cleared by the manufacturer of patent or proprietary medicines, being medicines falling under Item No.14E of the First Schedule to the Act were exempted from payment of excise duty. The expression `manufacturer' in the exemption notification was defined in the explanation appended thereto which reads as under:

> Explanation -- In this notification `manufacturer' means:
>
> (a) where it is a company within the meaning of the Companies Act, 1956 (I of 1956), a company --
>
> (i) which does not hold any share in the capital of any foreign company; and
>
> (ii) no part of the capital of which is held by a foreigner or a foreign company;
>
> (b) where it is a firm --
>
> (i) the firm has no interest in any foreign firm; and
>
> (ii) no interest in the firm is held by a foreigner or a foreign company; and
>
> (c) where it is an individual, such individual is not a foreigner.
>
> (Notification No.48/77 - C.E., dated 1.4.1977)

#. The petitioner's case is that although exemption from payment of duty on clearance of clinical samples was available to the it, under a mistake of law, it went on paying excise duty on those samples. According to the petitioner, this mistake was discovered subsequently when the exemption notification and particularly the definition of `manufacturer' contained in the explanation was construed by the Division Bench of this court in a decision rendered in the case of Suhrid Geigy Limited v.

Union of India and anr. reported in 1980 (6) ELT 759.

#. On the question of interpretation of definition of `manufacturer' provided in the explanation, the contention advanced on behalf of the Department in the case of Suhrid Geigy Limited v. Union of India and anr. (supra) was that in order to get benefit of the notification for exemption, the Company and the manufacturer should satisfy both conditions as contained in clauses (i) and (ii) of clause (a) of the explanation to exemption notification (supra). The argument advanced on behalf of the Department was that only such Company which is a manufacturer and which does not hold any share in the capital of any foreign company and no part of the capital of which is held by a foreigner or a foreign company, would alone be entitled to be treated as `manufacturer' for the purpose of exemption notification.

#. The Division Bench of this Court in the case of Suhrid Geigy Limited v. Union of India and anr. (supra) construed sub clauses (i) and (ii) of clause (a) of the notification (quoted above) and held that the word `and' between sub clauses (i) and (ii) is to be read conjunctively. The definition clause contained in explanation of `manufacturer' was construed and it was held:

"2. .....The exception is carved out by two circumstances. If there is company which holds a share in the capital of a foreign company and in the capital of which a foreign company or a foreigner holds a share, it is not a "manufacturer" for the purposes of the exemption notification. In other words the definition of "manufacturer" draws a clear distinction between companies incorporated in India which do not have any capital from a foreigner or a foreign company and which do not have any share in the capital of a foreign company. The expression "and" clearly suggests that both these conditions are required to be satisfied. It appears to us that it is the mutuality of foreign interest or foreign element which excludes a company from the class of manufacturers contemplated by the exemption notification. Therefore, if a pharmaceutical company incorporated in India holds a share in the capital of a foreign company but in the capital of which no foreigner or a foreign company holds a share, it is a "manufacturer" within the meaning of that expression as defined in clause (a) in the Explanation to the exemption

notification. So also a company which is incorporated in India and in the capital of which a foreigner or a foreign company holds a share but which does not hold any share in the capital of any foreign company falls within the meaning of the expression "manufacturer" as defined in clause (a) in the Explanation to the exemption notification. Therefore, if there is a company which is incorporated in India and to which both the circumstances specified in sub-clauses (i) and (ii) of clause (a) in the Explanation to the exemption notification are not attracted, it cannot be excluded from the class of "manufacturers" within the meaning of the expression as defined in clause (a) in the Explanation to the exemption notification.

3. In the instant case, since the petitioner-company did not or does not hold any share in the capital of any foreign company, it is the "manufacturer" within the meaning of that expression as defined in the exemption notification even though a part of its capital was, at the relevant time, held by a foreign company. In this context, we may refer to the to decisions of the Supreme Court which lay down rules of statutory interpretation.

The first decision is in Ishwar Singh Bindra and others v. State of U.P., AIR 1968 SC 1450. It was a case under the Drugs Act, 1940. The principle which has been laid down is as follows:

"and" generally has a cumulative sense requiring the fulfilment of all the conditions that it joins together. It is the antithesis of "or". However, sometimes in order to carry out the intention of the Legislature, it may be necessary to read "or" for "and" and "and" for "or".

4. In the instant case, it is not necessary to read "and" disjunctively because the two negative conditions which are joined by the expression "and" appear to us to suggest the mutuality of foreign element in regard to a company incorporated in India."

#. Construing thus the definition clause contained in Explanation to the exemption notification, it was held

that for the purpose of claiming exemption, it is not always necessary that both conditions in sub clauses (i) and (ii) of clause (a) in the Explanation to the exemption notification should be satisfied by a `manufacturer'. The decision of the Division Bench of this Court in the case of Suhrid Geigy Limited v. Union of India and anr. (supra) has been approved by the Hon'ble Supreme Court in it's decision reported in 1999 (107) ELT 579.

#. In this case, this Court, in its order made on 4th September, 1991, took note of the aforesaid facts including pendency of appeal filed by the Union of India against the decision rendered by this Court in Suhrid Geigy Limited v. Union of India and anr. (supra), and had postponed the case awaiting decision of the Hon'ble Supreme Court, which, as mentioned above, has been rendered.

#. The benefit of exemption notification was denied by Assistant Collector of Central Excise by the impugned order holding that since the share capital of the petitioner-Company to the extent of 40% is held by a foreign company named G.D.Searle & Company of Skokia, Illionis, U.S.A., it is not covered by the definition of `manufacturer' in explanation appended to the notification of exemption.

#. As has been held by the Division Bench of this Court in Suhrid Geigy Limited v. Union of India and anr. (supra) and affirmed by the Hon'ble Supreme Court by its order dated 8.4.97 in Civil Appeal (supra), both the conditions in sub-clauses (i) and (ii) of clause (a) to the explanation below the exemption notification are not satisfied and the petitioner-Company can claim to be a `manufacturer' and avail benefit of the exemption notification. The petitioner-Company, in whose capital, 40% share are held by foreign Company, incurs disqualification under sub-clause (ii) of clause (a) of the explanation, but since it does not hold any share in the capital of the foreign Company, the disqualification provided in sub-clause (i) of clause (a) of the explanation to the said notification is not attracted in its case. As held by the Division Bench of this Court and Hon'ble Supreme Court, since both the disqualifications mentioned in sub-clauses (i) and (ii) of clause (a) of the explanation to exemption notification are not attracted, the petitioner-Company cannot be held to be outside the definition of `manufacturer', and the benefit of exemption notification cannot be denied to it.

#. The petitioner filed refund application on the basis of exemption notification which has been rejected by the impugned order dated 4.3.83. In the impugned order refusing refund of duty, the competent authority held that at the time of making payment of duty, exemption under Notification No.48/77 was never claimed for the period for which claim was lodged and part of the claim was rejected on the ground of same being barred by limitation under Section 11-B of the Act.

##. The refund claims are for the period between March 1982 to August, 1982. Admittedly, the claim in a sum of Rs.24,949=96 is barred by limitation under Section 11-B of the Act. The remaining claim for refund of a sum of Rs.77,434=12, as mentioned under the caption "Summary" at page No.23 of the record, is within limitation.

##. The learned counsel appearing for the Department, in view of the decision of the Hon'ble Supreme Court, does not dispute the legal position that the exemption notification was available to the petitioner on the clinical samples cleared by it. The learned counsel for the Department however submits that for the periods in question, the decision of Division Bench of this Court in Suhrid Geigy Limited v. Union of India and anr. (supra), which was rendered in 1980, was known to all and yet the petitioner-Company paid duty on its clinical sample clearances without any protest or claiming any exemption under the said notification. It is therefore submitted that the refund claims even filed within time to the extent mentioned above should be rejected. Reliance is placed in support of this contention on the decision of Mafatlal Industries Ltd. & ors. v. Union of India & ors. reported in (1997) 5 SCC 536.

##. Since the claim for refund of duty relates to clearances of clinical samples, no duty was charged on the same by the manufacturer and therefore, it is admittedly not the case of any unlawful enrichment. The only contention advanced on behalf of the Department which is required to be considered is whether in view of the decision of Division Bench of this Court in Suhrid Geigy Limited v. Union of India and anr. (supra), refund claims were rightly rejected merely because duty was paid without protest.

##. The petitioner's case is that under mistaken belief that the exemption notification is not available to it, duty was paid and the mistake was discovered only when the Division Bench decision of this Court in the case of

Suhrid Geigy Limited v. Union of India and anr. (supra) came to its notice.

##. There is nothing in the decision of Mafatlal Industries Ltd. & ors. v. Union of India & ors. (supra) that where duty is paid under mistake without knowledge of verdict of the Court, refund claim can be rejected by the competent authority even when such claim for refund is filed within prescribed period of limitation.

##. The observations made by the Hon'ble Supreme Court in Mafatlal Industries Ltd. & ors. v. Union of India & ors. (supra), more particularly, in last part of paragraph-79, do not negative the claim for refund which is made within limitation prescribed in Section 11-B of the Act before the competent authority and on the ground that payment was made under mistake of law. In Mafatlal Industries Ltd. & ors. v. Union of India & ors. (supra), the Hon'ble Supreme Court held that where refund claim is not filed in accordance with the statute before the competent authority within limitation, a suit for refund even if filed within the prescribed period of three years under the Limitation Act cannot be decreed on the ground that the payment was made under mistake of law. In the instant case, refund claim was made in accordance with the provisions of the Act and within limitation. Therefore, we cannot hold that the Department, on the basis of decision of Hon'ble Supreme Court in Mafatlal Industries' case, can legitimately reject the claim for refund made by petitioner.

##. For the reasons aforesaid, we partly allow this petition. We hold that the claim for a sum of Rs.24,949=96 being barred by time, was rightly rejected. We however allow the refund claim of the petitioner for a sum of Rs.77,434=12, which shall be refunded by the respondents to the petitioner within a period of two months along with interest due thereon at the rate of 6% per annum. Rule is made absolute to the aforesaid extent. No order as to costs.

(D.M.Dharmadhikari, C.J.)

(D.A.Mehta, J.)

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